[2019] JMCA Civ 1

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 84/2016

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR HAYNES JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**BARBICAN HEIGHTS LIMITED**	**APPELLANT**
AND	**SEAFOOD AND TING INTERNATIONAL LIMITED**	**RESPONDENT**

Mrs Sandra Minott-Phillips QC and Miss Rachel Mclarty instructed by Myers Fletcher and Gordon for the appellant

Miss Gillian Burgess for the respondent

18 May 2017 and 18 January 2019

BROOKS JA

[1] I have had the privilege of reading in draft, the judgment of Sinclair-Haynes JA and agree with her reasoning and conclusion. I have nothing to add.

SINCLAIR-HAYNES JA

[2] This is an appeal from Master Stephanie Jackson-Haisley's (as she then was) refusal to accede to Barbican Heights Limited's (BHL) (the appellant) application for summary judgment.

The background

[3] Both BHL and Seafood and Ting International Limited (S&TL) are duly incorporated companies. On 1 August 2004 the parties entered into an agreement whereby S&TL leased from BHL property situate at 22 Millsborough Avenue, Kingston 6 in the parish of Saint Andrew for a period of five years. Ms Donna Roberts, S&TL's managing director, occupied the property with her child's father, Mr Frank Cox, who was the managing director of DYC Fishing Ltd (DYC).

[4] Upon the termination of the lease on 31 July 2009, Ms Roberts vacated the premises in August 2009. Mr Cox however remained and continued paying the rent which BHL accepted. He subsequently defaulted in his payments. BHL consequently instituted proceedings against ST&L on 8 February 2014 for the outstanding rental in the sum of US$241,500.00 and continuing with interest at the commercial rate.

The application for summary judgment

[5] On 5 May 2016 applications for summary judgment and for mediation to be dispensed with in relation to its claim were filed on BHL's behalf on the following grounds:

> "1. Good faith efforts to settle have been made and were not successful;
>
> 2. The defendant has failed to co-operate in having mediation convened; and
>
> 3. The defendant has no real prospect of successfully defending the claim."

BHL also sought the court's consideration of the following issues:

"1 The contractual relationship was between the Claimant and Defendant only under a Lease Agreement dated August 1, 2009 for premises located at 22 Millsborough Avenue, Kingston 6;

2 The claim is one for outstanding rent and utilities due to the Claimant from the Defendant;

3 The following facts namely that:

a. The Defendant agreed to pay rent under the lease (para 3 of the Lease);

b. The Defendant breached its covenant to pay when it ceased making payments in May, 2012;

c. There was no written notice to the Claimant to terminate the lease (para 5.8 of the Lease);

d. The Claimant did not provide written permission for the defendant to assign, sublet or otherwise part with the premises (para 3.7 of the Lease),

establish that the defendant remains indebted to the claimant for rent and utilities owed."

BHL's case

[6] BHL contended that the parties signed a second lease agreement dated 1 August 2009 for the said premises at a rental of US$11,500.00 per month. It was a term of that agreement that S&TL, would not assign, sublet or part with possession of the rented premises without BHL's written consent. In breach of that agreement, S&TL discontinued paying the rent.

S&TL's case

[7] S&TL denied signing or entering into a second lease with BHL. It denied owing the sums claimed by BHL. It contended that in October 2009, its lease agreement with

BHL ended by reason of effluxion of time. Consequently it gave up possession of the property to BHL.

[8] Another entity, DYC took possession of the property and paid rent to BHL, which rent BHL accepted. BHL had notice of the change of occupancy prior to and during ST&L's relocation and there was no complaint about its lease agreement. In the circumstances BHL is estopped from resiling from its acceptance of DYC as its tenant or from claiming any breach of its expired lease agreement with ST&L.

BHL's evidence

Ms Sheryl Thompson's evidence

[9] Ms Sheryl Thompson, the general manager for legal affairs for the Guardsman Group, of which BHL is a member, referred to the lease agreement dated 1 August 2009 which was appended to the particulars of claim on which BHL relied. She averred that the rent was to be paid on a quarterly basis. S&TL had been in default since 2012 and BHL has been unsuccessful in its effort to collect the rent owed.

[10] It was also her evidence that BHL had never given any permission in writing for S&TL to assign, sublet or otherwise part with the leased premises. BHL only became aware of S&TL's arrangement with DYC when it commenced proceedings for recovery of possession in May 2013.

[11] She further deponed that at no point in time did BHL receive any written notice of termination of the lease agreement or any notice at all from S&TL. BHL commenced

an action against S&TL for recovery of possession and it recovered possession on 12 March 2014.

[12] In respect of ST&L's application for mediation, she deponed that all efforts to convene mediation with S&TL had failed. It was her view that S&TL had no real prospect of successfully defending the claim which derived from its indebtedness to BHL.

S&TL's response

Mr Solomon Wentworth

[13] By way of affidavit, Mr Solomon Wentworth, a director of S&TL averred that pursuant to a written agreement dated 1 August, 2004, S&TL's then managing director, Donna Roberts, had entered into a five year lease with the BHL. That lease was determined on 31 July 2009.

[14] He averred that S&TL did not assign or sublet the premises to DYC and that there is no deed of assignment nor any agreement, formal or informal between S&TL and DYC in respect of the use and occupation of the premises.

[15] Ms Roberts lived at the premises from at least 2004 to about October 2009 with Mr Cox, with whom she had a child. Their relationship broke down and she left. Mr Cox however continued to live there.

[16] BHL was aware that Ms Roberts had left the premises yet it did not seek to collect rent from S&TL until sometime in 2012. Mr Wentworth denied BHL's assertion that the first time BHL became aware of the change in occupancy was 30 May, 2013.

[17] Mr Kenneth Benjamin, the managing director, and the person with whom S&TL was in contact in respect to the rented premises, was aware that S&TL had, by October 2009, given up possession of the property. Ms Roberts had informed Mr Benjamin that she had vacated the property. He pointed out that between October 2009 and 2012 there was no demand for rent from S&TL by BHL.

[18] It is his evidence that he is in the process of scrutinizing S&TL's records and there is no record of it paying rent to BHL between October 2009 and 2012, the period that it was not in occupation of the property.

[19] He was unable to speak to the authenticity of the lease of 1 August 2009 which purports to bear Donna Roberts' signature because Ms Roberts is now deceased and she had denied signing the document. S&TL, he deponed, desired an opportunity at the trial to have the original documents forensically examined and to cross-examine the witnesses who allege that the lease agreement is authentic.

[20] S&TL was disadvantaged because, although the relevant issues had arisen from 2012, BHL failed to institute proceedings until 2014 and made no effort to set the matter down for mediation until a year after the pleadings were closed. He further asserted that S&TL was ignorant of any effort made by BHL to convene mediation with it. He averred that the letters exhibited do not show a lack of co-operation by S&TL as

alleged. The first letter, he pointed out, was a request for mediation and that letter was dated 28 May 2015. It was addressed to Livingston Alexander & Levy which firm does not represent S&TL in this matter.

[21] The issues which have arisen are very serious and deserving of a full and proper investigation by the court to determine which party is speaking the truth. He opined that S&TL has a real chance of successfully defending the claim.

Mr Roger Chuck's evidence

[22] Mr Roger Chuck deponed that he was a casual director of S&TL and the brother of Ms Roberts. Whilst in the process of checking BHL's records, he discovered bank drafts belonging to DYC which were payable to BHL for the period 2004 to 2009. Nine bank drafts were exhibited to his affidavit.

Decision of the court below

[23] In deliberating upon the application for summary judgment, the learned Master in Chambers examined Part 15 of the Civil Procedure Rules (CPR) and the cases **Celador Production Limited v Melville and another** [2004] EWHC 2362 (Ch) and **Taylor-Wright (Marvalyn) v Sagicor Bank Jamaica Ltd** [2016] JMCA Civ 38. In considering whether S&TL had a real prospect of successfully defending the claim she deemed it necessary to resolve the following issues:

> "1. Whether the defence constitutes a bare denial;
>
> 2. Whether the defendant is deemed to admit the authenticity of the lease because of its non-compliance with CPR 28.19; and

3. Whether the issue of estoppel arises.

The learned Master, having examined both claims, resolved the issues in S&TL's favour and thus rejected BHL's contention that S&TL had no real prospect of successfully defending the claim.

[24] Having so found, she opined that in dealing with the matter, she was confronted with two decisions: whether to grant summary judgment; and if not, whether mediation ought to be dispensed with.

The appeal

[25] Displeased with the learned Master's refusal to grant its request for summary judgment, BHL filed the following grounds of appeal.

Grounds of appeal

> "(1) The learned Master in chambers erred in finding that the claimant ought to have pleaded the circumstances surrounding the execution by the defendant of the 2009 lease;
>
> (2) The learned Master erred in failing to hold the defendant to its agreed terms of the lease and in failing to apply the parol evidence rule.
>
> (3) The learned Master in chambers erred in not finding that the Defendant was deemed to have admitted the authenticity of the lease annexed to the Particulars of Claim.
>
> (4) The learned Master in chambers erred in failing to appreciate that summary judgment is a trial on the merits.
>
> (5) The learned Master in chambers erred in failing to appreciate sufficiently or at all that:

i. The departure of one of two persons occupying premises does not equate to a change of occupancy;

ii. A change of occupancy, if it occurred, does not equate to a relinquishment of possession in the circumstances at i. above;

iii. S&TL's evidence:

1. Did not question the witnessing of its execution in 2009;

2. Included an acknowledgment that it remained in occupation of the leased premises beyond the date of expiry of the prior (2004) lease between the parties;

3. Did not include evidence of the consent required under clause 3.7 of the 2009 lease;

4. Did not include evidence of the notice required under clause 5.8 of the 2009 lease;

iv. There are no facts pleaded in the defence that are sufficient to ground the estoppel alleged;

v. There would have been no reason for the Claimant to complain of a failure to receive rent while it was receiving rent;

vi. There are no pleadings, or evidence, of a surrender of the lease;

vii. It is not possible for a lessee to simultaneously terminate and sublet/assign a lease.

(6) The learned Master in chambers erred in failing to sufficiently appreciate that the Supreme Court is a court of Record and that, as such, evidence in Supreme Court cases is only admissible in relation to

pleaded issues. None of the following issues was pleaded in the Defence:

i. Fraud or forgery on the part of the Claimant;

ii. Surrender of the lease;

iii. Non est factum;

iv. Facts supporting the allegation of estoppel.

(7) The learned Master in chambers erred in failing to appreciate that a summary judgment proceeding is a trial on the merits.

Appellant's submissions

Grounds 1, 2, 3, and 6

[26] Grounds 1, 2, 3, and 6 can conveniently be dealt with together as the issues which arise on these grounds are inextricably linked. That is, whether the learned Master erred in not accepting that the veracity of the 2009 lease was beyond question.

[27] Queen's Counsel Mrs Minott-Phillips submitted that documentary evidence is the best evidence of its content. The lease document which was annexed to the particulars of claim, she submitted, speaks for itself. Queen's Counsel posited that the lease was *ex facie* a duly executed lease for a term of three years.

[28] She contended that S&TL cannot assert that the lease is a forgery without having so expressly pleaded. S&TL's pleadings amount to a bare denial and therefore cannot suffice as a basis for defending the claim. The learned Master, she submitted, also

erred in her finding that BHL was required to indicate the circumstances under which S&TL executed the contract.

[29] She relied on an extract from the text, **Cross and Tapper on Evidence** in arguing that extrinsic evidence is generally inadmissible to vary or contradict the terms of a judicial record, a transaction required by law to be in writing, or a document constituting a valid and effective contract or other transaction.

[30] Queen's Counsel argued that S&TL's bare denial of having entered into the second lease agreement is wholly inconsistent with its pleading that the first lease ended 31 July 31 2009 and its lease with BHL ended in October, 2009. If the first lease ended 31 July, S&TL must have entered into a second lease to have remained beyond the 31 July 2009.

[31] According to Queen's Counsel, if it was S&TL's contention that the arrangement to remain was in some form other than by the lease agreement appended to the particulars of claim, the bare denial in paragraph 3 of the defence is inadequate. S&TL would in the circumstances have been required to state the reasons for denying that it entered into the second lease and state the lease agreement it averred ended October 2009.

The issue regarding the copy lease

[32] The general rule, Queen's Counsel propounded, is that the primary evidence of a document is the original but a copy is just as good where the authenticity of the

document is not in issue. S&TL is therefore deemed to have admitted the authenticity of the lease as an annexure to the particulars of claim based on CPR 28.19.

[33] She pointed out that S&TL first intimated a possible challenge to the lease agreement by the filing of Mr Solomon Wentworth's affidavit two years after it had been disclosed.

[34] It was also Queen's Counsel's submission that S&TL did not challenge the authenticity of the lease. The only challenge was the allegation that it had not entered into the lease dated 1 August 2009. It was her further submission that a document is usually considered to be proof of its contents unless it is challenged.

[35] It was open to S&TL to have served a notice at any time between 10 May 2016 and 9 June 2016 on BHL requiring that the document be proved at trial. Not having done so, by virtue of the CPR, S&TL is deemed to have admitted the authenticity of the 2009 lease.

[36] By virtue of rule 10.5 of the CPR, S&TL was required to state the reason for denying an allegation in the particulars of claim. Such a denial could only have been done by alleging that the document was a forgery; and that was not done.

[37] BHL, she submitted, was prejudiced because no reason was given for the averment that Ms Roberts did not enter into or sign the lease.

[38] It was Queen's Counsel's further contention that if S&TL intended to assert that the lease was a forgery, it ought to have specifically so pleaded in its defence which it

did not do. In its affidavit evidence, S&TL stopped short of asserting that the 2009 lease is a forgery. There was neither pleading nor evidence of forgery in the court below The learned Master therefore erred in requiring BHL to provide further evidence as to the circumstances under which S&TL entered into the 2009 lease in the absence of either pleading or evidence of forgery.

Whether S&TL surrendered the lease and whether BHL is estopped from asserting otherwise

[39] It was Queen's Counsel's submission that S&TL's pleaded contention that the lease terminated upon it vacating the property was incorrect because that was not the agreed mode for prematurely ending the lease. Further, she submitted, a written contract cannot be modified by extrinsic evidence. Parol evidence to that effect is therefore inadmissible. The learned Master's reliance on the capability of inadmissible extrinsic evidence to contradict the parties' written contract led her into error.

[40] She further submitted that the mere assertion that the managing director, Ms Roberts, occupied the premises with the father of her child and that she left in October 2009 and he remained, is not sufficient to find that S&TL is a separate legal person from its managing director or that there was a change of occupancy. Mrs Minott-Phillips expanded on the contents of ground 5 of the appeal.

[41] Queen's Counsel argued that S&TL's evidence opposing the application for summary judgment does not show a change of occupation. It merely shows that one member of the family left and the rent continued to be paid. That, she posited, is insufficient to create an estoppel on an alleged acceptance of a new tenant by BHL

especially in the absence of evidence of S&TL relocating from the leased premises. She pointed out that the rent was payable in advance bi-annually in accordance with clause 8(b) of the lease. She also contended that the facts pleaded were insufficient to create an estoppel.

[42] Although BHL, as the lessor did not complain about the breach of the lease agreement until 24 December 2012 such conduct, she submitted, is not sufficient to support S&TL's argument that BHL was estopped from enforcing the lease agreement. Those assertions only suggest that the payment made on 1 February 2012 was short-paid and the rent which was due 1 August 2012 was not paid prior to the complaint.

ST&L's failure to plead

[43] Learned Queen's Counsel complained that the learned Master failed to appreciate the significance of pleadings in the Supreme Court. Evidence, she submitted, can only be admissible in relation to the pleaded issues. She pointed out that S&TL did not plead forgery, *non est factum* or that the lease had been surrendered. Further, she posited, surrender would have been inconsistent with an absence of the change of occupancy.

[44] S&TL's defence was inherently inconsistent because S&TL could not credibly deny entering into the lease of 1 August 2009 whilst asserting that it vacated the property in October 2009. Further, she contended, S&TL could not assert that it surrendered a lease it claimed it never entered into.

[45] The issue of occupancy was live but not arguable because our law requires surrender to be: (a) in writing or be evidenced in writing; or (b) an act coupled with the operation of law, Queen's Counsel argued. The acts relied upon must be inconsistent with the continuation of the tenancy and the threshold test is high, she submitted.

[46] Learned Queen's Counsel referred to the following acts averred in the defence:

a) DYC took up possession; and

b) Paid rent which BHL accepted without demur.

[47] S&TL's affidavit in support disclosed nothing unusual or remarkable about DYC paying the rent, because DYC's principal was living with Ms Roberts at the premises and they had a child together. In those circumstances, the fact that DYC paid rent is neither remarkable nor new and is not inconsistent with the continuation of the lease dated 1 August 2009. Furthermore, she submitted, one of the cheques exhibited by S&TL was from DYC. That cheque was a payment by S&TL under the lease which ended on 31 July, 2009. S&TL, was deemed to have accepted the authenticity of the lease in the absence of any challenge to it.

[48] She posited that extrinsic evidence was not required to contradict the contents of a document which is not otherwise invalid.

[49] She argued that one person leaving the premises cannot equate to the surrender of the lease. The evidence regarding Mr Benjamin's knowledge of Ms Roberts leaving

and/or consenting to the surrender of the lease is hearsay, and therefore inadmissible, she submitted.

[50] BHL was deprived of an opportunity to respond to the submission regarding Mr Benjamin's knowledge and acceptance of DYC's tenancy because that submission was only made during the hearing of the matter.

S&Tl's response

[51] Ms Burgess submitted that the Court of Appeal ought not to lightly interfere with the exercise of a judge's discretion. For that proposition, she referred the court to **Attorney General of Jamaica v John McKay** [2012] JMCA App 1 a decision of this court in which the principles enunciated in **Hadmor Productions v Hamilton** [1982] 1 All ER 1042 were applied.

[52] It was counsel's submission that the learned Master neither misunderstood the facts nor the law and she did not find that facts existed which did not exist. She argued that the judgment is not aberrant and therefore should not be set aside.

[53] The defence filed by S&TL raised two alternative defences in law and equity. The first, S&TL did not enter into a lease dated 2009 and the second, estoppel. BHL, was aware that S&TL had given up possession of the property and a new entity had been accepted as the tenant. The due execution of the 2009 lease was in issue because S&TL, by way of its defence, challenged its validity.

[54] Ms Burgess argued that BHL was required to do more than rely on the document, in circumstance where the lease has not been exhibited. She also argued that the parol evidence rule is inapplicable in these circumstances.

[55] It was her submission that the departure of persons from premises could and did in fact and law equate to a change in occupancy or the surrender of possession. That is particularly true in the instant case where only one person is on the lease and the other person is there at that person's behest. In support of her submission she relied on the principles enunciated in **Sanctuary Housing Association v Campbell** [1999] 1 WLR 1279 and **Ealing Family Housing Association Limited v Johnson McKenzie** [2003] EWCA Civ 1602.

[56] In further addressing whether a change in occupancy could equate to the relinquishment of possession in the circumstances of this case, counsel argued that it was dependent on whether the landlord accepted the remaining spouse as its tenant and which answer depended on the facts and degree. She relied on the principle enunciated in **Artworld Financial Corporation v Safaryan & Others** [2009] EWCA Civ 303 for that proposition.

[57] Ms Burgess submitted that BHL knew that the principal of S&TL had left the premises and had refused to accept responsibility for the party, Mr Cox, who remained. BHL collected rent from Mr Cox for upwards of four years and did not give him notice to quit. In those circumstances BHL is estopped from claiming that S&TL is its lessee while collecting rent from a third party.

[58] She argued that S&TL was relying on estoppel by conduct as opposed to promissory or proprietary estoppel. BHL was aware that it received rent from Frank Cox and it accepted Mr Cox as its tenant. Estoppel by conduct, she submitted, is predicated on the principle that the law will give effect to the intention of the parties based on their conduct notwithstanding the informality of the surrender. She cited **Artworld Financial Corporation** in support of that argument.

[59] In respect of whether or not S&TL had pleaded that it had surrendered the lease, she submitted that the affidavits speak for themselves. It was S&TL's evidence that it has never sublet the premises or assigned the lease. It was her assertion S&TL did not sign the 2009 lease.

[60] It was Ms Burgess' contention that all the relevant facts were pleaded and the learned Master properly exercised her discretion to allow the claim to go to trial.

[61] Ms Burgess told the court that in the alternative, S&TL relies of the defence of estopppel by conduct. She postulated that whether the removal of one person results in a change of occupancy is a matter of fact. Ms Thompson's affidavit, she submitted, denies that:

(a) BHL knew that Ms Roberts had left;

(b) DYC was in possession; and

(c) there was no notice in relation the change of possession.

It was learned counsel's submission that although BHL's particulars of claim stated that it did not consent; S&TL's contention is that Ms Roberts had informed Mr Benjamin and therefore was a question of fact for resolution at a trial.

Grounds 4 and 7

Submissions on behalf of BHL

[63] Mrs Minott-Phillips submitted that the learned Master fell into error in refusing to accept that summary judgment hearing is a trial on the merits and by her statement that Part 28 of the CPR does not apply.

[64] Summary judgment, learned Queen's Counsel contended, is a short form of trial used to adjudicate any claim, if the long form of a trial would result in a waste of judicial time and resources.

[65] The summary judgment procedure is not confined to single issue cases or simple matters. The learned Master therefore made fundamental errors of law and fact which had she not made, would have affected her decision and she would have come to a different conclusion. Queen's Counsel argued that the learned Master erred in relying on the case of **Marvalyn Taylor-Wright v Sagicor** because the facts of that case are distinguishable.

[66] The sum claimed is finite as it relates to the monthly unpaid sum up to the point of recovery of possession. The application for summary judgment was made on the

basis that: (a) S&TL has no real prospect of defending the claim; and (b) S&TL has never given the required notice that it was assigning the lease to DYC pursuant to the lease.

[67] BHL having placed before the court material for summary judgment, S&TL was required to discharge an evidential burden by establishing a real prospect of successfully defending the claim, this, Mrs Minott-Phillips submitted, it failed to do.

S&TL's submissions

[68] Ms Burgess argued that ground seven is a repetition of ground four. It was Ms Burgess' submission that the application for summary judgment was supported by the affidavit of Ms Sheryl Thompson. That affidavit however did not speak to the execution of the lease nor did she exhibit the lease. Those circumstances, counsel posited, were crucial to the application for court orders.

[69] Before pronouncing on the validity of the lease and holding the defendant to the purported agreed terms; the issue whether the terms were agreed, had to be resolved. That issue, she submitted, could not be dealt with at a summary judgment hearing.

[70] According to counsel, BHL relied on the erroneous proposition that a summary judgment application is a trial for the purpose of Part 28 of the CPR. Ms Burgess contended that the authorities emphasise that the summary judgment procedure is not meant to be a mini-trial. The usual principles applicable to a trial such as the civil standard and burden of proof are inapplicable. She pointed out that there is also no cross-examination at a summary judgement hearing.

[71] Counsel further argued that the Master adequately and correctly dealt with the application of Part 28 of the rules that was referred to her. Ms Burgess also relied on her submissions in relation to ground 3. She contended that the issues raised on the evidence could not have been decided on an application for summary judgment.

[72] In relation to grounds four and seven, counsel submitted that 'trial' is used forensically in Part 28. In addition, Part 15 of the CPR, she submitted, refers to the summary judgment procedure as a hearing as opposed to a trial. Ms Burgess referred the court to rule 15.5 of the CPR which sets out the manner in which the summary judgment hearing should be conducted. Learned counsel also drew the court's attention to the distinction referred to by the learned Master in her judgment.

The learned Master's treatment of the issue raised in grounds 4 and 7

[73] The learned Master, in rejecting counsel's submission that summary judgment is a trial on its merits, opined at paragraph [53] of her judgment:

> "Summary judgment applications have been likened to a trial on pleadings but to say that it is a trial on the merits may be taking it a step too far. A trial on the merits is where witnesses have an opportunity to give evidence and be cross examined. The case **Three Rivers District Council v Bank of England (NO 3)** [2003] 2 AC [2003] 2 AC 259-261...points out that the method by which issues of fact are tried in our courts is well settled…"

The learned Master, in distinguishing between summary judgment hearing and a trial, said at paragraph [54]:

> "The cases have been clear and have even gone as far as to caution that a summary judgment hearing is not a mini-trial.

> In particular in **Swain v Hillman** Lord Wolfe [sic] MR advanced that summary judgment applications have to be kept within their proper role. They are not meant to dispense with the need for a trial where there are issues which should be considered at trial. Lord Wolfe [sic] even cautioned that the judge should not be conducting a mini-trial and that that is not the object of the provisions but rather it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

[74] The learned Master also examined **Artworld Financial Corporation** and at paragraph [59] said:

> "…Indeed there is a high threshold which must be crossed if the tenant is to be held to have surrendered and the landlord is to be held to have accepted the surrender. In order for me to determine this issue on this summary judgment application I would have to conduct what is tantamount to a mini-trial. **However I find that these are issue[s] which should be determined in a full blown trial. It is my view that this Defence of estoppel raises issues that should be subject to investigation and determined after evidence is heard**." (Emphasis supplied)

[75] At paragraph [62], she quoted Lord Steyn's renowned statement in **Three Rivers District** that:

> "… In that event a trial of the facts would be a waste of time and money and it is proper that the action should be taken out of the court as soon as possible."

And concluded at paragraph [63] that:

> "On a proper construction of all the information before the court in the instant case I find that the Defence is more than just fanciful, bearing in mind the contention that the

> Defendant did not enter into a second lease agreement and that it vacated the property and that a third party took up possession and in furtherance of that this party, they alleged, paid rent to the Claimant which was accepted by the Claimant. Based on that there appears to be some merit in this Defence. What is also clear is that there is a significant dispute as to fact as it relates to the lease agreement. The issue of estoppel is another question that the court would have to resolve based on the facts and the law. Summary judgment is usually only granted in clear cut cases where the law is clear."

At paragraph [66] she continued thus:

> "... in this case I find that there are real issues to be tried. Among the issues are whether the Defendant entered into this lease agreement dated August 1, 2009 and whether or not another entity took up possession and paid rent to the Claimant. Those issues should be subject to trial. In light of that I am of the view that the Defendant has a real prospect of successfully defending the claim. I find therefore that this is not an appropriate case for the grant of summary judgment. The application for summary judgment is dismissed."

Law/analysis of the issues raised by grounds 4 and 7

Are summary judgment hearings trials on their merit?

[76] An application for summary judgment is a process for ridding the courts of cases that are doomed to fail. Parties are therefore obliged to demonstrate, upon such an application that the prospect of their case succeeding is realistic. Examination of the learned Master's treatment of each relevant issue and her conclusion is necessary in determining whether she fell into error as posited by Queen's Counsel and whether ST&L's defence has a real prospect of succeeding.

[77] Summary judgment applications are governed by rule 15.2 of the CPR which states:

> "The court may give summary judgment on the claim or on a particular issue if it considers that-
>
> (a) The claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) The defendant has no real prospect of successfully defending the claim or the issue."

[78] At page 64 of the Commonwealth Caribbean Civil Procedure, third edition, the learned authors pointed out that:

> "[On] an application for summary judgment the claimant must satisfy the court of the following:
>
> "(a) All substantial facts relevant to the claimant's case, which are reasonably capable of being before the court, must be before the court.
>
> (b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.
>
> (c) There must be no real prospect of oral evidence affecting the court's assessment of the facts."

[79] It is now settled that cases that are hopeless should not be allowed to continue. The foremost issue in this case is whether the S&TL's defence has a real prospect of succeeding. If it has, the judge would have been correct in determining that it is not an appropriate case for summary disposal.

[80] Lord Woolf's MR oft cited statement in the English case, **Swain v Hillman and another** [2001] 1 All ER 91 reads:

> "… The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success … they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[81] More recently in **Sagicor Bank Jamaica Limited v Marvalyn Taylor Wright** [2018] UKPC 12, the Privy Council provided further clarification on the issue. Lord Briggs, who delivered the judgment on behalf of the Board, said at paragraphs 16 and 17:

> "16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.
>
> 17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. **But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.**" (Emphasis supplied)

[82] The Board examined "the criterion for deciding whether a trial is necessary" as stated in Part 15.2 of the CPR above and concluded at paragraphs 18 through 21 that:

"18. That phraseology does not mean that, if a defendant has no real prospect of defending the claim as a whole, that there should nonetheless be a trial of an issue. **The purpose of the rule in making provision for summary judgment about an issue rather than only about claims** is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, **but which do not themselves require a trial.**

19. **The court will, of course, primarily be guided by the parties' statements of case**, and its perception of what the claim is will be derived from those of the claimant. This is confirmed by Part 8.9 which (so far as is relevant) provides as follows:

> '(1) **The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.**
>
> (2) ...
>
> (3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.'

Para.8.9A further provides:

> 'The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.'

20. **Nonetheless the court is not, on a summary judgment application, confined to the parties' statements of case.** Provision is made by Part 15.5 for both (or all) parties to file evidence, and Part 15.4(2) acknowledges that a summary judgment application may be heard and determined before a defendant has filed a defence. **Further, it is**

> **common ground that the requirement for a claimant to plead facts or allegations upon which it wishes to rely may be satisfied by pleading them in a reply, not merely in particulars of claim:** see para 61 of the judgment of the Court of Appeal in this case.
>
> 21. The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for a trial. If the pleaded claim justifies granting the relief sought then, if the claimant proves that claim, it will succeed. If the alleged defence also justifies the relief sought, then the claimant will succeed even though the defendant proves the facts alleged in her defence. In either case, the defendant will have no real prospect of successfully defending the claim, within the meaning of Part 15.2(b)." (Emphasis supplied)

[83] As plainly stated by the Board, summary judgment hearings are designed to determine whether a trial of the "issues will generally be nothing more than an unnecessary waste of time and expense". And to deal with issues which "do not themselves require a trial". There Lordships therefore drew a clear distinction between a summary judgment hearing and a trial. The learned Master was correct in this regard. Ground 4 and 7, in my view fail.

Whether the defence constitutes a bare denial

[84] In determining whether the defence constituted a bare denial, the learned Master relied on **Janet Edwards v Jamaica Beverages Limited** (unreported) Supreme Court of Jamaica, Suit No CL 2002/E-037, judgment delivered 23 April 2010.

In respect of S&TL's denial that it entered into a second lease, the learned master examined S&TL's defence and its affidavits in support and remarked that:

> "The Defendant's pleadings with respect to this lease agreement are indeed sparse. The late Ms Roberts who signed the Defence is the alleged signatory under the lease. **The Defendant has not said that this lease contained a forgery of her signature or that the document was fraudulent.** It would no doubt have been more desirable for the Defendant to explain why it is saying that this lease agreement appended to the Particulars of claim was not entered into by the Defendant although it bore a signature purporting to be that of Ms Roberts, the then representative of the Defendant." [Paragraph 37] (Emphasis supplied)

[85] After addressing the importance of pleadings, the learned Master considered whether S&TL's failure to provide an explanation was fatal. She said:

> "...If all the Defendant herein had done was to issue a denial of entering into the lease agreement without more then I would have had to rule that this was in fact a bare denial and no doubt proceed to enter summary judgment, **but there is more than that in the Defence in the instant case.**" [Paragraph 44] (Emphasis supplied)

She then recapitulated the defendant's case as follows:

> "The Defendant highlights circumstances in support of the denial by seeking to show that not only did it not enter into this lease agreement but in furtherance of not entering into a second lease the late Ms Roberts moved out of the premises a few months after the expiration of the first lease, and another entity ... DYC Fishing took up possession of this property... The Defendant is also contending that it did not sublet the premises but this entity took up possession with the consent of the managing director of the claimant, Mr Kenneth Benjamin." [Paragraph 45]

[86] In continuing her analysis as to whether the defence was a bare denial, the learned Master examined BHL's particulars of claim in her quest to determine "whether the Defence addresse[d] the claims made therein". It was her finding that BHL had merely averred that S&TL had entered into lease agreement dated 1 August 2009. She observed that there was no indication as to the circumstances under which the late Ms Roberts' signature came to be on the document.

[87] The learned Master opined that BHL could have provided a response to S&TL's defence that it did not enter into the lease agreement. She said at paragraph [46]:

> "... It was also open to the Claimant in this application for summary judgment to expand on those circumstances. The affidavit of Sheryl Thompson does not address the circumstances under which the lease was entered into,..."

She consequently held at paragraph [47] that:

> "In light of the paucity of information in the Particulars of Claim with respect to how the parties to the lease agreement entered into this agreement, **I find that the averments made by the Defendant in its Defence, though sparse, provide a sufficient reply to the Particulars of Claim**. Further, that the details provided about the Defendant giving up possession and another entity taking up occupation and paying rent to the Claimant supplement this denial. In the circumstances I therefore find that the defence does not constitute a bare denial." (Emphasis supplied)

[88] The learned Master was also mindful of S&TL's assertion that BHL had "full notice" of the change of occupancy before S&TL's vacated the property and during DYC's occupation and there was no complaint from BHL for more than three years.

[89] She also considered S&TL's assertion that it was consequent on DYC's default in paying the rent that BHL sought to complain. The learned Master was also mindful of S&TL's further assertion that BHL is consequently estopped from resiling from its acceptance of DYC fishing**.**

Ruling

[90] In response to BHL's claim, S&TL's defence denied having entered into the October 2009 lease agreement. At paragraph 3 of the defence S&TL averred as follows:

> "The defendant denies entering into the lease agreement dated August 1, 2009 and puts the Claimant to strict proof."

[91] Had it stopped at that assertion without more, BHL's claim that the defence was a bare denial might have been justified S&TL however provided its version of what transpired by denying that it had sublet the premises. Its assertion that another entity, DYC Fishing, with the concurrence of BHL's managing director took up possession of the property, *prima facie* has provided more than a mere denial. There is therefore no merit to the complaint that the defence was a bare denial.

Whether the defendant is deemed to admit the authenticity of the lease

[92] In addressing the issue of whether S&TL was deemed to have accepted the authenticity of the lease, the learned Master observed that up to the point in time of the application for summary judgment, S&TL had not pleaded fraud; neither was it alleged in the affidavits filed on its behalf.

[93] She reviewed the authorities upon which BHL relied in respect of fraud and accepted the position "that fraud must be distinctly alleged and distinctly proved and that it was not allowable to leave fraud to be inferred from the facts" (paragraph [48]). At paragraph [48], she further said:

> "... The Defendant however has not pleaded this as a part of its Defence. I do not find that the failure to do so is detrimental to its case because it has not indicated an awareness of a fraud being committed or that it is aware of the details of any fraud. Allegations of fraud are serious allegations, no doubt because this could take a matter into the criminal arena. Such allegations should not be made lightly and certainly not without evidence to support it."

[94] She consequently held the view that it was palpable from the averments of Mr Wentworth that it was S&TL's desire "to embark on a process of investigation with respect to the lease agreement in order to ascertain whether or not it is in fact authentic". She deemed it necessary to address the effect of S&TL's failure "to challenge the authenticity of the lease agreement in accordance with CPR 28.9" meant that it is deemed to have admitted "the authenticity of the lease and cannot seek to supplement its 'bare denial' by belatedly challenging the authenticity of the lease" (paragraph [49]).

[95] In dealing with that issue, she examined rule 28.19 of the CPR which speaks to documents disclosed in a statement of case and noted that:

> "... CPR 28.17 refers to documents referred to in statements of case and provides that a party may inspect and copy a document mentioned in the claim form, a statement of case, a witness statement or summary, an affidavit or an expert's report. The lease agreement is appended to the statement

> of case and so I find that it has been disclosed for the purpose of these proceedings and so the usual rules of disclosure apply." (Paragraph [50])

The learned Master further expressed the view that:

> In the circumstances I find that CPR 28.19 applies strictly to trials and not to summary judgment applications and therefore the Defendant's failure to give notice does not mean that it is deemed to admit the authenticity of the lease."(Paragraph [55])

[96] It is settled law that an appellate court ought not to interfere with the exercise of a judge's discretion even if it would have exercised its discretion differently unless the judge's exercise of her discretion was so "palpably wrong" or so" aberrant" that a judge mindful of his duties could not have arrived at that conclusion. See **Hadmor** and **G v G** [1985] 2 All ER 225.

[97] With the advent of the CPR, trial by ambush is no longer permissible. In keeping with the spirit in which trials are now to be conducted, rule 10.5 of the CPR mandates that a defence sets out all the facts on which it relies. Rule 10.5 reads:

> "(1) The defence must set out all the facts on which the defendant relies to dispute the claim.
>
> (2) Such statement must be as short as practicable.
>
> (3) In the defence the defendant must say -
>
> (a) which (if any) of the allegations in the claim form or particulars of claim are admitted;
>
> (b) which (if any) are denied; and

(c) which (if any) are neither admitted or denied, because the defendant does not know whether they are true, but the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.

(4) Where the defendant denies any of the allegations in the claim form or particulars of claim-

(a) the defendant must state the reasons for doing so; and

(b) **If the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence**.

(5) Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not -

(a) admit it; or

(b) deny it and put forward a different version of events the defendant must state the reasons for resisting the allegation.

(6) The defendant must identify in or annex to the defence any document which the defendant considers to be necessary to the defence.

(7) A defendant who defends in a representative capacity must say-

(a) what that capacity *is*; and

(b) whom the defendant represents.

(8) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.12." (Emphasis supplied)

[98] The crux of the defence is that S&TL did not enter into the 2009 lease agreement. It surrendered the lease and BHL "had full notice of the change of

occupancy prior to and during [ST&Ls] relocation from [BHL's] premises" and DYC was accepted by BHL as its tenant.

[99] A signature which BHL claims to be that of Ms Roberts is affixed to the 2009 lease agreement. On S&TL's case, the signature which purports to be that of Ms Roberts was not hers. S&TL's denial that Ms Roberts signed the lease agreement is therefore tantamount to averring that her signature was forged.

[100] It is significant that Mr Wentworth is apparently unable to categorically assert that the signature is not that of Ms Roberts. On his evidence, it is apparent that S&TL intended to embark on a fishing expedition to discover whether indeed it was Ms Roberts' signature. The disputed signature on the copy lease agreement is not feint. Indeed it is bold and quite unique. He has not pointed to any aspect of the signature which has given him cause for concern.

[101] Mr Chuck, a director of S&TL and Ms Roberts' brother, was also unable to speak to the authenticity of both the signature and seal on the lease agreement. He averred that S&TL was not given the original lease with the original signatures and seal to enable him to make comparisons and to have the document forensically examined and so he was unable to speak to its authenticity and required "the opportunity to have the original documents forensically examined and at the trial of the claim, to call evidence as to the due execution of this document". He also wished "to cross-examine the claimant's witnesses who alleged that [the] document was genuine".

[102] In my view, in light of the not only close business relationship, but also the familial relationship Mr Chuck had with Ms Roberts, it is remarkable that he too is unable to discern any aspect of the signature which "appears" to be forged.

[103] No allegation of forgery was however pleaded or particularised in either ST&L's defence or the affidavits on which it relied. In response, S&TL's defence denied having entered into the October 2009 lease agreement. At paragraph 3 of the defence S&TL averred as follows:

> "The defendant denies entering into a lease agreement dated August 1, 2009 and puts the Claimant to strict proof."

[104] It is well settled that allegations of fraud must be specifically particularised. Rule 10.7 specifically states that:

> "The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission."

[105] No mention was made in ST&L's defence in respect to: *non est factum*, surrender or forgery. Harris JA in **Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley, et al Walters and RBT Bank Jamaica Limited and RBTT Bank Jamaica Limited v Estate Rudolph Daley and et al Walters and Harley Corporation Guarantee Investment Company Limited** [2010] JMCA Civ 46, carefully dealt with requirement to particularise

allegations of fraud by examining its historical background and its applicability to our jurisdiction. She said:

> "[53] In placing reliance on an allegation of fraud, a claimant is required to **specifically state, in his particulars of claim, such allegations on which he proposes to rely and prove and must distinctly state facts which disclose a charge or charges of fraud.**
>
> [54] At the time of the commencement of the actions the Civil Procedure Code, was the relevant procedural machinery in place. Section 170 stipulated that certain causes of action, on which a party seeks to rely, must be expressly pleaded.
>
> The section reads:
>
> 'In all cases in which the party pleading relies on any misrepresentation fraud shall be stated in the pleading'
>
> [55] In **Wallingford v The Directors of Mutual Society** [1880] 5 AC 685 at 697 Lord Selbourne succinctly defined the principle in this way:
>
> 'With regard to fraud, if there be any principle which is perfectly well-settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon; in a manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded…'
>
> [56] In **Davy v Garrett** [1878] 7 Ch D 473, Thesiger L.J at page 489 acknowledged the principle as follows:
>
> **'In the Common Law Courts no rule was more clearly settled than that fraud must be**

> **distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts**…**it may not be necessary in all cases to use the word 'fraud'…it appears to me that a Plaintiff is bound to shew distinctly that he means to allege fraud.** In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence." (Emphasis supplied)

[106] At paragraph [57] Harris JA continued her examination of the applicability of the principle to Jamaica by scrutinizing the CPR. She observed that:

> "The Civil Procedure Rules however do not expressly provide that fraud must be expressly pleaded. **However, rule 8.9 (1) prescribes that the facts upon which a claimant relies must be particularized**. **It follows that to raise fraud, the pleading must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud.** Not only should the requisite allegations be made but there ought to be adequate evidentiary material to establish that the interest of a defendant which a claimant seeks to defeat was created by actual fraud.

[107] In **Sunshine Dorothy Thomas and Winsome Blossom Thompson (Executrices of the estate of Leonard Adolphus own, deceased) and Owen Brown v Beverly Davis** [2015] JMCA Civ 22, Panton P endorsed the aforementioned view expressed by Harris JA in **Hartley Corporation Guarantee Investment Company Ltd v Estate Rudolph Daley and Others** that although the CPR do not expressly require that fraud be expressly pleaded, the claimant is required to state the facts or conduct upon which it relies to support the allegation of fraud

[108] Lord Denning MR in **Associated Leisure Ltd and others v Associated Newspapers Ltd** [1970] 2 All ER 754 plainly stated that unless there is "clear and

sufficient evidence to support" an allegation of fraud, it should not be pleaded. As noted by Harris JA, although the CPR does state that fraud ought to be specifically pleaded, S&TL was required to provide particularization of the facts or conducts which it alleges/asserts is consistent with fraud.

[109] The Privy Council reiterated the well-established principle in **Donovan Crawford and Others v Financial Institution Limited PC** [2005] UKPC 40. Lord Walker of Gestingthorpe, on the Board's behalf, said

> "It is well settled that actual fraud must be precisely alleged and strictly proved..." [Paragraph 13]

[110] S&TL's defence failed to particularize the nature of the fraud. Indeed both the defence and the affidavits are bereft of any particulars of the alleged forgery. This is contrary to the requirement to do so by the rule and the stance adopted by this court.

[111] A signature purporting to be that of Ms Roberts' was affixed to the lease agreement which was attached to the defence. S&TL has denied signing the said lease. As noted above, the responsibility was on S&TL to particularise its reasons and it failed to do so.

[112] Mr Wentworth's desire to embark on a process to discover whether the signature is that of Ms Roberts cannot suffice. If S&TL intended to impugn BHL's claim on that allegation, it ought to have at least pointed to an irregularity in the signature or the seal as its reason for so asserting.

[113] Furthermore, as Queen's Counsel submitted, pursuant to rule 28.19 of the CPR, the responsibility rested with S&TL to notify BHL of its desire to have the document proved at the trial. At the summary judgment hearing, an application could have been made to have the document proved, or at least, the respondent could have communicated its intention so to do.

[114] It is true that a summary judgment hearing is not a trial in the sense that the cross examination of parties are not permitted. But depending on the matters relied upon, a judge or Master presiding over a summary judgment hearing might be able to determine whether, on such an application, the matter ought to proceed to trial or not.

[115] If, however, a party denies the authenticity of a document on which reliance is being placed, nothing prevents him from notifying the other party of his intention to have the document proved at trial. Such an application could have also assisted the court in determining whether a trial is necessary or "a trial of those issues will generally be nothing more than an unnecessary waste of time" (paragraph [17] of **Sagicor Bank Jamaica Limited v Marvalyn Taylor Wright**). I however agree with the learned Master's observation that the lease agreement was appended to the statement of case and would therefore have been "disclosed for the purpose of these proceedings". Moreover ST&L's defence challenged the authenticity of the lease and required BHL to prove its authencity.

[116] The learned Master commented that the signature which purports to be that of Ms Roberts was witnessed by "an unnamed attorney". That observation is somewhat

exaggerated. It is true that the name of the signatory is indecipherable, but the name of the law firm is printed clearly below the signature. In light of the foregoing, in my view, BHL's above stated complaints, except as mentioned, are invalid. Grounds 1, 2, 3, and 6 therefore succeed.

Ground 5

The defence estoppel/surrender

[117] Is there a real prospect of S&TL succeeding on its defence that it had surrendered the lease? According to S&TL's defence, BHL is estopped from denying ST&L's defence that it had surrendered the lease at its expiration by virtue of its:

(a) Removal from the premises;

(b) DYC having taken possession;

(c) DYC's payment of rent to BHL; and

(d) BHL's acceptance without objection of such rent until2012. ;

[118] Paragraph 5 of BHL's particulars of claim specifically provided that:

> "Pursuant to Clause 3.7 of the lease Agreement, the Defendant agreed not to assign, sublet or part with possession of the rented premises without the Claimant's written consent."

By virtue of Clause 3.7 of the lease agreement, S&TL had agreed not to assign, sublet or part with possession of the rented premises without BHL's written consent. S&TL has not challenged or disputed that clause.

[119] ST&L's assertion that Mr Benjamin, BHL's managing director, was informed by Ms Roberts that S&TL had given up possession and that another entity, DYC had entered into possession, cannot suffice. The requirement pursuant to the agreement was that notice ought to have been in writing. A verbal communication with BHL's managing director to depart from the written agreement without more, is insufficient to constitute acquiescence. Although remarkably, Mr Benjamin has not sought to refute S&TL's assertion, it is a well-known principle that, "he who asserts must prove". S&TL does not indicate in any way how it intends to support its assertion.

[120] On the other hand, payment of the rent by way of DYC's cheques is unremarkable in light of the unchallenged evidence that during ST&L's occupation of the premises, DYC's cheque had been used for such a payment.

[121] Of significance, Mr Cox, DYC's managing director, Ms Roberts common law partner and the father of her child, had cohabited with her at the premises. Assuming BHL was aware that Ms Roberts was absent from the property, BHL could not be fixed with having knowledge as to the reason. Her absence might have been temporary.

[122] I find support for that view in Gibson LJ statement in **Bellcourt Estates v Adesina** [2005] EWCA Civ 208.

> "The doctrine of surrender by operation of law is founded on the principle of estoppel, in that the parties must have acted towards each other in a way which is inconsistent with the continuation of the tenancy. **That imposes a high threshold which must be crossed if the tenant is to be held to have surrendered and the landlord is to be**

> **held to have accepted the surrender."** [Paragraph 30] (Emphasis mine)

[123] In any event, by virtue of the lease agreement, the responsibility was on S&TL to provide the requisite notice of its termination of the lease. Importantly also, neither the defence of estoppel nor the particulars on which S&TL relied to support that claim was either pleaded or particularised. The learned Master erred in finding that this constituted a triable issue. Ground 5 in my view also succeeds.

[124] In light of the foregoing, it is my view that the following orders should be made:

(1) Appeal allowed.

(2) Order of Master Jackson-Haisley (Ag) is set aside.

(3) Summary judgment entered in the sum of US$241,500.00 for the appellant.

(4) Costs to the appellant in this court and in the court below to be taxed if not agreed.

[125] The court extends its sincere apologies for the delay in the delivery of this judgment.

STRAW JA (AG)

[126] I have read in draft the judgment of my sister Sinclair-Haynes JA. I agree with her reasoning and conclusion and have nothing to add.

BROOKS JA

ORDER

(1) Appeal allowed.

(2) Order of Master Jackson-Haisley (Ag) is set aside.

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